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E-FILED on 1/15/10

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

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METTEYYA BRAHMANA, No. C-09-00106 RMW

Plaintiff,

v.

PHILLIP CHARLES LEMBO, CYBERDATA  
CORPORATION, NUMONIX, INC., and  
CONQUEST TECHNOLOGY LIMITED,

Defendants.

ORDER GRANTING IN PART AND  
DENYING IN PART MOTION FOR LEAVE  
TO AMEND COMPLAINT

[Re: Docket No. 123]

Plaintiff Metteyya Brahmana, *pro se* in this matter, moves for leave to amend his complaint to state additional claims and to add a new defendant. For the reasons set forth below, the court grants the motion in part and denies the motion in part.

## I. BACKGROUND

Plaintiff filed his Third Amended Complaint ("TAC") on August 27, 2009. The TAC includes causes of action for hostile work environment, employment discrimination, wrongful constructive discharge, wrongful termination, false light tort, invasion of privacy, California labor code violations, and violation of the Electronic Communications Privacy Act ("ECPA"). In the TAC, plaintiff alleged that someone with the alias "SuperDooperCDsnooper" sent an email on July 29, 2008 to several CyberData employees "implying falsely that plaintiff considered himself to be the 'fifth (upcoming) Buddha' because his first name is similar to the last name of the Aria Metteyya

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ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR LEAVE TO AMEND COMPLAINT—No. C-09-00106  
RMW  
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1 Buddha who is supposed to appear in the distant future, that plaintiff did not have a bachelor's  
2 degree from UC Berkeley or a Master's degree in Business Administration, and had a restraining  
3 order filed against him by his ex-wife." TAC at ¶ 33. After plaintiff complained to defendant  
4 Phillip Lembo, Lembo responded, "I know it is a CyberData employee sending the email, but my  
5 suggestion is to increase your sales to stop these emails." *Id.* at ¶ 34. Other CyberData employees  
6 were uncomfortable around Brahmana after the email was sent. *Id.* at ¶ 35.

7 On November 16, 2009, while taking the deposition of Cameron Barfield, a CyberData  
8 employee, plaintiff discovered that Barfield was the "SuperDooperCDsnooper" referred to in the  
9 TAC. Decl. of Metteyya Brahmana in support of Pl.'s Mot. for Leave to Amend Compl. ¶ 2.  
10 Plaintiff now seeks leave to file a Fourth Amended Complaint ("FAC"). The proposed FAC adds  
11 Cameron Barfield as a defendant, alleges claims for negligent and intentional infliction of emotional  
12 distress against Barfield and other defendants, alleges public policy violations as part of his claim  
13 for wrongful termination, and makes new factual allegations regarding improper use of the  
14 CyberData corporate jet. Defendants oppose plaintiff's motion only insofar as it seeks to: (1) add  
15 claims for negligent and intentional infliction of emotional distress and (2) add Barfield as a  
16 defendant.

## 17 II. ANALYSIS

18 Federal Rule of Civil Procedure 15(a)(2) provides that the court should "freely give leave [to  
19 amend pleadings] when justice so requires." Courts are to apply Rule 15's policy of favoring  
20 amendment to pleadings with "extreme liberality," particularly when the litigant is *pro se*, as in this  
21 case. *Eldridge v. Block*, 832 F.2d 1132, 1135 (9th Cir. 1987). Even with a *pro se* litigant, however,  
22 the court may deny leave to amend when a proposed amendment is futile. *Armstrong v. Rushing*,  
23 352 F.2d 836, 837 (9th Cir. 1965). "[A] proposed amendment is futile only if no set of facts can be  
24 proved under the amendment to the pleadings that would constitute a valid and sufficient claim or  
25 defense." *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988).

### 26 A. Negligent Infliction of Emotional Distress

27 Negligent infliction of emotional distress is a form of the tort of negligence. *Huggins v.*  
28 *Longs Drug Stores California, Inc.*, 6 Cal. 4th 124, 129 (1993). Accordingly, to establish a claim

1 for negligent infliction of emotional distress, plaintiff must allege each of the following elements of  
2 negligence: (1) duty, (2) breach of duty, (3) causation, and (4) damages. *Id.* A duty to the plaintiff  
3 may be "imposed by law, be assumed by the defendant, or exist by virtue of a special relationship."  
4 *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 985 (1993) (citing *Marlene F. v. Affiliated*  
5 *Psychiatric Med. Clinic, Inc.*, 48 Cal.3d 583, 590 (1989)). The California Supreme Court has made  
6 clear that there is no duty to avoid negligently causing emotional distress to another. *Id.* at 984.

7 [U]nless the defendant has assumed a duty to plaintiff in which the emotional  
8 condition of the plaintiff is an object, recovery is available only if the emotional  
9 distress arises out of the defendant's breach of some other legal duty and the  
emotional distress is proximately caused by that breach of duty. Even then, with rare  
exceptions, a breach of the duty must threaten physical injury, not simply damage to  
property or financial interests.

10 *Id.* at 985. Therefore, plaintiff must either allege a duty owed the plaintiff regarding his emotional  
11 condition or allege that his emotional distress arises out of defendant's breach of some other legal  
12 duty.

13 As set forth in the FAC, plaintiff's negligent infliction of emotional distress claim against  
14 Cameron Barfield is based on the allegation that Barfield was "negligent in sending out an email to  
15 nearly all CyberData employees without any regard for the truthfulness of the contents of this email,  
16 and the dissemination of this email caused plaintiff serious emotional distress . . . as a direct result of  
17 this negligent act by Mr. Barfield." FAC at ¶ 81. Plaintiff does not allege that Barfield owes him a  
18 duty of care regarding his emotional condition, nor does plaintiff allege that the emotional distress  
19 he suffered arose out of Barfield's breach of some other legal duty. Moreover, the only relationship  
20 alleged between Barfield and plaintiff is that both are employees of CyberData. Such a relationship  
21 is insufficient to create a duty of care regarding plaintiff's emotional well-being. Thus, no set of  
22 facts can be proved under this proposed amendment which would constitute a valid claim against  
23 Barfield for negligent infliction of emotional distress.

24 As for the other named defendants, the FAC states that they "failed to exercise ordinary care  
25 to properly supervise, investigate, or discipline Cameron Barfield for his act . . . or set the proper  
26 professional tone in the office that encouraged Barfield to feel it was OK to send false implications  
27 via email." FAC at ¶ 82. When an employer's alleged misconduct consists of "actions which are a  
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1 normal part of the employment relationship," claims for emotional distress are preempted by the  
2 exclusivity provisions of the workers' compensation law. *Cole v. Fair Oaks Fire Protection Dist.*,  
3 43 Cal. 3d 148, 160 (1987); *Livitsanos v. Superior Court*, 2 Cal. 4th 744, 747 (1992). Supervising,  
4 investigating, or disciplining an employee and setting the professional tone in the office (or failure to  
5 do so) clearly fall within a normal part of the employment relationship.<sup>1</sup> Therefore, plaintiff's claim  
6 for negligent infliction of emotional distress against the other named defendants is barred by the  
7 exclusivity provisions of the workers' compensation law.

8 Because the proposed amendment adding the claim of negligent infliction of emotional  
9 distress is futile, the court denies leave to make this proposed amendment.

10 **B. Intentional Infliction of Emotional Distress**

11 To establish a claim for intentional infliction of emotional distress, plaintiff must allege: (1)  
12 outrageous conduct by defendant, (2) defendant's intent to cause, or reckless disregard of the  
13 probability of causing, emotional distress, (3) severe emotional distress, and (4) an actual and  
14 proximate causal link between the tortious conduct and the emotional distress. *Nally v. Grace*  
15 *Community Church*, 47 Cal. 3d 278, 300 (1988). For the conduct to qualify as outrageous, it must  
16 be so extreme that it "goes beyond all possible bounds of decency so as to be regarded as atrocious  
17 and utterly intolerable in a civilized community." *Gomon v. TRW*, 28 Cal. App. 4th 1161, 1172  
18 (1994). "Insults, indignities, annoyances, petty oppressions or other trivialities will not suffice. The  
19 conduct must be such that it would cause an average member of the community to immediately react  
20 in outrage." *Id.*

21 In the FAC, plaintiff bases his claim of intentional infliction of emotional distress upon an  
22 email sent by Barfield to CyberData employees that allegedly implied "falsely that plaintiff  
23 considered himself to be the 'fifth (upcoming) Buddha' because his first name is similar to the last  
24 name of the Aria Metteyya Buddha who is supposed to appear in the distant future, that plaintiff did  
25 not have a bachelor's degree from UC Berkeley or a Master's degree in Business Administration, and

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27 <sup>1</sup> Defendants' alleged failure to supervise, investigate, or discipline an employee for sending out an  
28 email that contains false implications also does not implicate public policy concerns such that it  
would fall outside the scope of the exclusivity provisions of the worker's compensation law.

1 had a restraining order filed against him by his ex-wife." FAC at ¶ 33. Neither Barfield's act of  
2 sending this email nor the other defendants' failure to prevent such an email from being sent go  
3 "beyond all possible bounds of decency so as to be regarded as atrocious and utterly intolerable in a  
4 civilized community." *Gomon*, 28 Cal. App. 4th at 1172. Consequently, plaintiff fails to allege a  
5 claim for intentional infliction of emotional distress (both against Barfield and against other named  
6 defendants). Moreover, for the same reasons explained above, plaintiff's claim for intentional  
7 infliction of emotional distress, as asserted against other named defendants, is barred by the  
8 exclusivity provisions of the workers' compensation law.

9 Because the proposed amendment adding the claim of intentional infliction of emotional  
10 distress is futile, the court denies leave to make this proposed amendment.

11 **C. Addition of Cameron Barfield as a Defendant**

12 At the hearing on December 15, 2010, plaintiff stated that he seeks to assert only the  
13 following three causes of action against Barfield in the FAC: (1) negligent infliction of emotional  
14 distress, (2) intentional infliction of emotional distress, and (3) false light tort. As discussed above,  
15 the court denies leave to add the negligent and intentional infliction of emotional distress claims.  
16 The parties have not addressed the remaining false light tort claim against Barfield in their papers.  
17 Because defendants have indicated their intent to file a motion to dismiss on other grounds  
18 regardless of whether Barfield is added as a defendant, the court defers ruling on whether plaintiff  
19 has successfully alleged a false light tort claim and grants leave to amend the complaint to add  
20 Barfield as a defendant. Defendants have the opportunity to seek dismissal of the false light tort  
21 claim for failure to state a claim in their forthcoming motion to dismiss.

22 Counsel for defendants has represented to the court that they will represent Barfield if  
23 Barfield is added as a defendant. Counsel for defendants is to advise plaintiff whether they will  
24 accept service on behalf of Barfield or whether he must be served.

25 **D. Scheduling Order**

26 Defendants request that the court modify the deadlines in its June 26, 2009 scheduling order  
27 to provide them with more time to respond to the new complaint. Defendants represented to the  
28 court that they intend to file a motion to dismiss plaintiff's Title VII and California Fair Employment

1 and Housing Act ("FEHA") claims, followed by a motion for summary judgment regarding any  
2 remaining claims. The court notes that defendants could have filed a motion to dismiss earlier, as  
3 plaintiffs' Title VII and FEHA claims had already been alleged in the TAC. Nonetheless, in light of  
4 the amendments in the FAC, it seems fair to give defendants more time to file motions that may  
5 narrow the scope of the case. Therefore, the court adopts the following amended schedule:

6 4/13/10 Discovery and expert cutoff  
7 5/14/10 Hearing on dispositive motions  
8 6/15/10 Joint pretrial statement  
9 6/22/10 Pretrial conference  
10 7/6/10 Jury trial

11 The court declines to set a hearing date for a motion to dismiss that has not yet been filed.

### 12 **III. ORDER**

13 For the foregoing reasons, the court grants the motion in part and denies the motion in part as  
14 follows:

15 1. The court denies leave to amend the complaint to add claims for negligent infliction  
16 of emotional distress and intentional infliction of emotional distress.  
17 2. The court grants leave to amend the complaint in all other respects. Plaintiff may file  
18 an amended complaint in conformance with this order.  
19 3. The court sets the following schedule:

20 4/13/10 Discovery and expert cutoff  
21 5/14/10 Hearing on dispositive motions  
22 6/15/10 Joint pretrial statement  
23 6/22/10 Pretrial conference  
24 7/6/10 Jury trial

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27 DATED: 1/15/10

*Ronald M. Whyte*  
28 RONALD M. WHYTE  
United States District Judge

1 **Notice of this document has been electronically sent to:**

2 **Plaintiff:**

3 Metteyya Brahmana mbrahmana@gmail.com

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5 **Counsel for Defendants:**

6 James Joseph Cook jcook@horanlegal.com  
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8 Counsel are responsible for distributing copies of this document to co-counsel that have not registered  
for e-filing under the court's CM/ECF program.

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10 **Dated:** 1/15/10

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CCL  
12 Chambers of Judge Whyte

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